The Attorney General of Texas

May 22, 1979

Overruled by ORD-257

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Mr. V. A. Robertson, Jr., President
Board of Trustees
Round Rock Independent School District
Round Rock, Texas

Open Records Decision No. 223

Re: Whether names of applicants for position of school superintendent are public under Open Records Act.

Dear Mr. Robertson:

You request our decision pursuant to section 7 of article 6252-17a, V.T.C.S., the Texas Open Records Act. You have received a request for a list of the names of all persons who have applied, or are being considered, for the position of superintendent of schools of your district. The information involved is a list of 46 names of individuals who have expressed interest in the position of superintendent of schools. The district explains that the inquiries were received with assurances that the information would be held in confidence.

You contend that this information is excepted from required public disclosure under section 3(a)(1) or 3(a)(2) because publication would be an unwarranted invasion of the privacy of the applicants. Section 3(a)(2) protects "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." We believe that information concerning an identifiable individual's application for employment meets the first requirement of this exception as being "information in personnel files." See Open Records Decision No. 110 (1975).

The application of section 3(a)(2) depends on two additional factors — an invasion of personal privacy and a finding that the invasion is unwarranted. In a case in Florida a similar privacy claim was recently made. There a citizen sought information compiled by a consultant firm hired to conduct a search for potential applicants for a high managerial position of a public utility firm. In determining whether the names of prospects were public the court said

> even the facially least sensitive information recorded, which seemingly does no more than identify the prospects, receives greater import from the

> context: these persons were not identified for a statistical abstract or for other purposes insignificant to their privacy interests; they were identified as having interviewed the consultant at some length concerning a new job. The prospects believed that public revelation of that information would result in 'dire consequences' to their professional lives. The consultant's testimony in the case attests that such concerns are genuine and widespread, though we may doubt that they are universal. The trial judge found that 'significant damage may result' from public disclosure of the prospects' identities.
>
> A substantial showing is thus made that public revelation of the prospects' identities, addresses, and basic family and vocational associations would be offensive to persons of ordinary sensibilities.

Byron, Harless, Schaffer, Reid and Associates v. State ex rel. Schellenberg, 360 So.2d 83, 96 (Fla. App. 1978).

Under the reasoning of the Florida court we believe that the information requested here can meet the first half of the section 3(a)(2) test as constituting an invasion of personal privacy. The second half of the test — determining whether the invasion of privacy caused by release of the information would be "clearly unwarranted" — requires a balancing test. Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 681-682 (Tex. 1976).

The first factor to be placed in the balance is the public's strong interest in having an opportunity to inform itself on the affairs of government. See, e.g., Texas Open Records Act, V.T.C.S. art. 6252-17a, § 1. This factor is entitled to even greater weight in consideration of the particular importance of the position of school superintendent.

The other side of the balance would include the public's interest in insuring that qualified individuals are encouraged to apply. It has been suggested that persons employed by other school districts would sometimes decide not to apply since their present position might be adversely affected if they publicly seek another position. Of course, this factor would not generally apply if the applicant is currently employed by the same district.

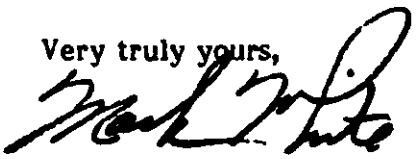
Finally, we believe it is relevant to note that the position sought in this case is an employment rather than a public office. Although the position is certainly an important one, it does not involve the exercise of the sovereign function of the government largely independent of the control of others. See Aldine Ind. Sch. Dist. v. Standley, 280 S.W.2d 578, 583 (Tex. 1955); compare Open Records Decision Nos. 212 and 188 (1978). The law has made a traditional distinction between officers and employees, and we believe that the fact that a person has applied for appointment to an office weighs more heavily in the balance toward requiring disclosure than is the case where, as here, the individual is seeking an employment.

The balance is delicate, but in this case we believe it will tend to fall to the side of the applicant for employment. Where an individual seeks public employment rather than public office, where he has a legitimate and reasonable expectation that the fact of the application will be retained in confidence, and where he reasonably believes that his current employment would be adversely affected if it is disclosed that he has applied for a different job, we believe that disclosure of his name as an applicant would ordinarily constitute a clearly unwarranted invasion of personal privacy within the contemplation of section 3(a)(2).

The district should measure the name of each individual against these criteria to determine if disclosure of his name would come within this test. The key question will be whether the individual reasonably believes that his current employment would be adversely affected if it were known that he was seeking another job. As we have indicated, we do not believe that current employees of the district can make such a showing absent special circumstances.

It is our decision that the names of applicants for the position of school superintendent in this case are not required to be revealed where the applicant is able to demonstrate that release of his name is likely to have an adverse effect on his current employment.

Very truly yours,



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